No. 74-1588

In the Supreme Court of the United States

OCTOBER TERM, 1975

FORD MOTOR CREDIT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, which holds a lien on a car, contends that the forfeiture of the automobile deprived it of property without due process of law or just compensation because it was not connected with the acts that precipitated the forfeiture.

On July 15, 1971, Frank Green bought a used 1969 Plymouth Fury automobile. Petitioner financed the purchase and retained a security interest. One month later, Green was arrested and charged with possession of counterfeit Federal Reserve notes, in violation of 18 U.S.C. 472. The automobile, which had been used by Green to transport the notes, was seized by the Secret Service for forfeiture. See 49 U.S.C. 781, 782 and 31 C.F.R. 401.1-401.3. Green was convicted as charged.

Petitioner was notified of the seizure and filed a petition for remission, pursuant to 19 U.S.C. 1618. The petition was denied.

On May 2, 1972, the government filed its complaint in the United States District Court for the Northern District of Texas, in accordance with 19 U.S.C. 1608, seeking a judgment of forfeiture under 49 U.S.C. 782. Petitioner intervened and sought possession of the automobile, remission of the forfeiture, and foreclosure of its security interest. The government moved for summary judgment; petitioner responded with affidavits setting forth the nature of the credit check its employees had obtained on Green. The affidavits asserted that petitioner had taken no part in Green's activities and had no reason to believe that Green had engaged or would engage in illegal activities. The district court entered summary judgment granting the forfeiture.

The court of appeals declined to hold 49 U.S.C. 781 and 782 unconstitutional on their face or as applied in this case and affirmed the judgment (Pet. App. A-1 to A-3; 476 F.2d 960). The court remarked that 19 U.S.C. 1618 permitted petitioner to seek remission of the forfeiture. Over the dissent of six judges, the court declined to rehear the case *en banc* (Pet. App. A-4 to A-7).

1. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, holds that statutory forfeiture schemes constitutionally can apply to the property interests of those not involved in the forfeiting act. "[T]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property" (*id.* at 687-688).

The Court did observe that it would be difficult to reject the constitutional claim of "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property" (*id.* at 689). But the Court went on (*id.* at 689-690, n. 27):

> Since 1790 the Federal Government has applied the ameliorative policy—first adopted in England, see *United States* v. *Morris*, 10 Wheat. 246-295 (1825)—of providing administrative remissions and mitigations of statutory forfeitures in most cases where the violations are incurred "without willful negligence" or an intent to commit the offense. See 1 Stat. 122, c.12 (1790); 1 Stat. 506 (1797); Rev. Stat. §§5292-5293 (1874); 19 U.S.C. §1618; *The Laura*, 114 U.S. 411, 414-415 (1885); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721 (1971). Indeed, forfeitures incurred under 21 U.S.C. §881(a), which served as the model for enactment of the disputed Puerto Rican statute, see n. 25, *supra*, are subject to the remission and mitigation procedures of 19 U.S.C. §1618. See 21 U.S.C. §881(d). Regulations implementing §1618 provide that, if the seized property was in the possession of another who was responsible for the act which resulted in the seizure, the petitioner must produce evidence explaining the manner in which the other person acquired possession and showing that, prior to parting with the property, he did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 C.F.R. §171.13(a). These provisions are also extended to those individuals holding chattel mortgages or conditional sales contracts. 19 C.F.R. §171.13(b).

The remission statute and regulations apply with full force to petitioner's case. Congress has not provided that an innocent lien holder is without remedy. Petitioner seeks to present the ultimate constitutional issue of the taking of its property only because its petition for remission or mitigation was denied. But once such remission

procedures are available, there is no occasion for this Court to decide petitioner's constitutional argument unless petitioner has established that the remission regulations offer inadequate or illusory protection to its interests. We submit that petitioner has not carried that burden.[1]

Petitioner's sole claim in the court of appeals was that the statutes are unconstitutional on their face because they could deprive one who did not participate in or know of the criminal enterprise of his property. Indeed, petitioner specifically stipulated on appeal that this was the only question presented by the case (Court of Appeals Appendix, p. 5).[2] Petitioner did not claim that it fell within the statutory exception warranting mitigation or remission of the forfeiture. While this case was pending on petition for rehearing, petitioner, in a letter dated July 3, 1974, called *Calero-Toledo* to the court's attention and once more observed that the question whether petitioner qualified for an exception to the forfeiture statutes was not before the court, suggesting a remand to address that question. In short, petitioner never argued that its petition for remission was not properly denied. It therefore has not laid the groundwork for the constitutional issue it now seeks to present; it has not shown that the remission statute is inadequate.

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[1]The government stipulated in the court of appeals that there was no evidence that petitioner bore any culpability for the counterfeiting. That concession is not dispositive of this case, for *Calero-Toledo* also observed that forfeiture could induce lien holders to take "greater care." Cf. *United States* v. *Park*, No. 74-215, decided June 9, 1975.

[2]Petitioner's brief in the district court (p. 1) characterized petitioner's contention as:

> It is Ford Motor Credit Company's position that under the United States Constitution the forfeiture statute, 49 U.S.C. §781-72 [*sic*], should not be made applicable to the innocent lienholder, who had no knowledge that its automobile would be used for the illegal purposes.

2. Because petitioner did not challenge the Attorney General's action not to remit or mitigate the forfeiture, the record in the district court is skimpy. We nevertheless believe that it is significant to the disposition of this case to observe that whenever a petition for mitigation or remission is filed, the Customs Agency Service, a division of the United States Bureau of Customs, is required to conduct a thorough fact-finding investigation to determine whether any allegedly non-negligent petitioner, prior to parting with the property, did not know or have reasonable cause to believe that the property would be used in violation of the law or that the violator had a criminal record or a reputation for commercial crime. 19 C.F.R. 171.13(a) and (b). If the "innocent" party has done all it reasonably could have done, the regulations provide for remission. We have no reason to believe that the investigation was not carried out here.

The investigating agent's only method of making the determination required by the regulations in a case of this sort is to determine how well petitioner's employees checked the credit references Green gave to petitioner. According to the affidavits submitted by petitioner to the district court, Green gave three credit references. Of these three references, petitioner determined that Green had completed payments of a $560 loan to his second credit reference, Spain Auto Sales, Hawn Freeway, Dallas. However, the third (a Sears, Roebuck & Co. store in Dallas) reported that Green had no credit record "for lack of an account number." The affiants apparently did not (or made no attempt to) contact the first credit reference, "Smith Furniture Company, 2d Avenue, Dallas." The Retail Merchants Association of Dallas, through which petitioner also made a credit reliability check on Green, had no record of Green's credit activities. (Boswell affidavit, p. 2.) It would have been reasonable for the Customs Agency Service and the Attorney General to conclude from these facts that petitioner's efforts were not so complete that they should have been rewarded with remission.

3. Finally, we note that although the car has been forfeited to the United States, petitioner has a right to full payment from Green. Petitioner's security interest in the vehicle was simply one method of attempting to increase the probability that petitioner would recover its investment. Under the retail installment contract between petitioner and Green (Appendix to Plaintiff's brief in the district court) neither Green's default nor the forfeiture terminated Green's obligation to pay the price. Petitioner has not alleged that it has been unable to recover the price; if Green were to satisfy that obligation (voluntarily or pursuant to litigation), petitioner would suffer no loss because of the forfeiture. The major impact of the forfeiture is not on petitioner but on Green, unless Green violates his contract with petitioner. As between the United States and Green, petitioner should look first to Green for satisfaction. The government surely is entitled to withhold remission if Green pays (or has paid) petitioner, lest petitioner obtain a double recovery. It may be—although we cannot tell on the record of this case—that remission was denied simply because petitioner did not demonstrate that it had made adequate efforts, but had been unable, to collect from its debtor.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

DOJ-1975-08